No. 11830

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

CLARANCE A. REES and EVELYN E. REES, bankrupts,
Appellants,

vs.

SOREN N. JENSEN and ANNA JENSEN, *Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEES

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JURISDICTION

As stated in Appellants' brief, jurisdiction of the District Court is based upon U.S.C. Title 28, Section 41-19, relating to proceedings in Bankruptcy, and specifically upon Section 17(a)(2) of the Bankruptcy Act, 11 U.S.C. Sec. 35(a)(2) which provides:

> "Debts not affected by a discharge.
>
> "(a) A discharge in bankruptcy shall release a bankrupt from all his provable debts, whether allowable in full or in part, except such as * * * (2) *are liabilities for* obtaining money or property by false pretenses or false representations, or for *wilful and malicious injuries to the person or property of another.*" * * * (Italics ours)

Jurisdiction of this court is based upon U.S.C. Title 28, Sec. 225, authorizing an appeal to the United States Circuit Court from a final decision of a Federal District Court.

SUMMARY OF PROCEEDINGS

The appellees, Soren N. Jensen and Anna Jensen, his wife, are judgment creditors of appellants, having obtained a judgment for $1064.90 on June 5, 1945, in the Superior Court of the State of Washington for King County for the unlawful and intentional conversion of a house and other structures located upon property purchased by appellants from one Cora J. Skirving, which they knew at the time of the purchase were not included in the sale, and which they also knew to be the property of another (Bankrupts' Ex. 3, R. 65-75-76-78).

In order to avoid the judgment, appellants filed a petition in bankruptcy in the Federal District Court for the Western District of Washington, Northern Division. Appellees resisted the discharge, on the ground that their judgment debt was not dischargeable under Sec. 17(a)(2) quoted above.

The litigating parties stipulated that the Referee in Bankruptcy assume jurisdiction of the issues raised (R. 3), and thereafter appellants offered and the Referee received in evidence, along with other papers, the pleadings and Findings of Fact and Conclusions of Law and Decree of the King County Superior Court.

After taking the matter under advisement, the Ref-

eree granted a discharge to the bankrupts, excepting therefrom the judgment debt (R. 20).

Feeling aggrieved thereby, appellants filed a petition for review to the District Court, and after hearing oral argument and considering the law and the facts and the records of both the Bankruptcy Court and the King County Superior Court (R. 24), the District Court sustained the Referee's decision (R. 21).

Feeling now aggrieved at the King County Superior Court's decision, the Referee's decision and the District Court's decision, appellants seek a further review by this court.

SUMMARY OF ARGUMENT

The court is concerned here with one question:

Is the appellees' judgment debt dischargeable in bankruptcy?

To resolve it, two other questions must be answered:

1. Do the facts upon which the judgment was based show an intentional unlawful conversion of appellees' property by appellants?
2. Does an intentional unlawful conversion of property constitute "wilful and malicious injuries to the person and property of another," as required under Section 17(a)(2) of the Bankruptcy Act?

If these two questions are answered affirmatively, it then follows that the appellees' judgment debt is not dischargeable, and the decision of the Referee in Bankruptcy excepting the debt from the discharge and

the order of the District Court sustaining the Referee will stand.

This court will not disturb the concurrent findings of the Referee and the District Court except for mistake or a miscarriage of justice.

In re Eastern Oil Co. (C.C.A. 9) 100 F.(2d) 341;

Newman v. Burnham (C.C.A. 6) 126 F.(2d) 336;

Carr v. So. Pac. Co. (C.C.A. 9) 128 F.(2d) 764, 768;

In re Caplan (C.C.A. 2) 149 F.(2d) 731;

MacGowan v. Barber (C.C.A. 2) 127 F.(2d) 458;

Kauk v. Anderson (C.C.A. 8) 137 F.(2d) 231;

Williamson v. Williams (C.C.A. 4) 137 F. (2d) 341;

Weisstein Bros. & Survol v. Laugharn (C. C.A. 9) 84 F.(2d) 419, 420.

ARGUMENT

1. Do the Facts Show An Intentional Unlawful Conversion of Appellees' Property By Appellants?

Let us look at the record made in the Superior Court, upon which the Referee and the District Court made their findings, conclusions and decrees.

The Superior Court Record

(a) The pleadings

The pleadings in the Superior Court action are significant because the issue of unlawful, intentional

conversion was placed squarely before the court. It was pleaded in the complaint and admitted in the answer.

Appellees as plaintiffs brought an equitable action against defendants for the recovery of certain real property and buildings, upon the grounds of equitable frustration, adverse possession, and unlawful conversion of a house and other structures located upon one of the tracts involved.

Specifically, it was alleged that plaintiffs and one Cora J. Skirving owned adjacent lands. Upon the Skirving property were located a house and certain other structures which plaintiffs purchased at a sheriff's foreclosure sale as separate personal property. Plaintiffs attempted to move all the structures to their adjoining property, but due to a mutual misunderstanding of the true boundary line between the two properties, the buildings were removed to another portion of the Skirving property about 65 feet north of the boundary line.

According to plaintiffs' complaint, defendants, appellants here, purchased the Skirving property as vacant land, knowing at the time that the improvements were no part of the sale, and they paid no consideration therefor (R. 46). Immediately thereafter they unlawfully and wrongfully took possession of the buildings, and denied plaintiffs the use and enjoyment thereof (R. 42-43-45-46). In plaintiffs' prayer for relief they sought to be restored to full possession and ownership of the buildings, for reimbursement for loss of rentals, and for such other and further relief

as to the court might seem right and proper (R. 47-48).

Defendants answered the complaint, admitting that the buildings described in the complaint were considered as personalty and were separate and apart from the land they purchased, admitted that plaintiffs purchased the buildings at sheriff's sale and moved them to another part of the land (R. 56), and freely admitted that as soon as they purchased the land from Cora J. Skirving they took possession of plaintiffs' buildings (R. 54).

(b) The Findings of Fact and Conclusions of Law

Upon the issues so framed the case went to trial, and the Superior Court made the following pertinent Findings of Fact (R. 72):

"XII.

"That at the time of the issuance of the deed to Defendants, Rees and wife, the Plaintiffs had tenants upon said property, and that Defendants Rees and wife demanded that said tenants immediately leave the premises and deliver up physical possession to them; and that immediately thereafter the Defendants Rees and wife took possession of the premises and have kept same up to the present time,, over the objections of Plaintiffs.

"XVI.

"That in 1932, one Doc Hamilton purchased the aforesaid property on real estate contract, and in 1932 erected a house, sheds, barn and removed a refrigerator car thereon; that thereafter certain labor liens were foreclosed thereon, and Cora J. Skirving was made a party defendant.

That subsequently she entered into a stipulation in said action that the buildings be separated from the land and sold as personalty, and the title to her land be free from any cloud thereby.

"XVII.

"That, in accordance with said stipulation, on or about May 9, 1938, said buildings were offered for sale at public auction by the Sheriff of King County and that Plaintiffs purchased the same. That thereafter Plaintiffs removed all of said buildings from the particular place where they were then standing onto the North 65 feet of the above described property, by mistake and inadvertance and under the mistaken belief that they owned said property as the south portion of Lot 4. That at said time it was the general belief of both Plaintiffs and the Defendant Skirving that the North 65 feet belonged to Tax Lot 4, and said Defendant agreed that said buildings might be permanently located at the place of removal under that belief.

"That at no time would the Plaintiffs have continued in possession of or maintained said buildings upon the North 65 feet as aforesaid, and at no time would the Defendant Skirving have agreed that Plaintiffs should remain in possession of said North 65 feet, if they, or either of them, had known where the true boundary line between Tax Lot 4 and the Defendant Skirving's property actually existed.

"That the houses, sheds, barns and each structure now upon said North 65 feet have been at all times considered as personalty by the Plaintiffs and the Defendant Skirving; *and that at the time of her sale of said property to the Defendants, Clarence A. Rees and wife, said structures*

were not included in the sale and no consideration was given for them, or either of them. That the Defendants Rees and wife never at any time believed they were purchasing said structures, or either of them, having been advised at the time of their purchase that the buildings were no part of the property purchased. (Italics ours)

"XVIII.

"That notwithstanding the facts hereinabove set out, the Defendants, Clarance A. Rees and Evelyn E. Rees, his wife, on or about January 20, 1944, took possession of all and every one of the structures hereinabove mentioned, moved into the house and ejected the Plaintiffs' tenants therefrom, *and in all respects converted said property to their own uses; and denied the use or possession of same to Plaintiffs and their tenants;* and continue to do so up to the present time, although the Plaintiffs collected rent thereon for January and February, 1944, and their tenants remained in possession of said houses during said period. (Italics ours)

"XIX.

"That the fair market value of the house and other structures upon the North 65 feet of the Defendant Skirving's property so converted by the Defendants, Rees and wife, at the time of the conversion on or about January 20, 1944, was $1,000.00."

From the foregoing findings, the Superior Court made the following pertinent Conclusions of Law (R. 77):

"III.

"That this is an equitable action, and the court has the right to do equity between the parties,

once it has acquired jurisdiction of the parties and the causes of action.

"IV.

"That the Defendants, CLARANCE A. REES *and* EVELYN E. REES, *his wife, have converted personal property belonging to the Plaintiffs, consisting of a house, shed, barn and other structures situated on the North 65 feet of the Defendants' property, which property was so located thereon by agreement of the Plaintiffs and Defendant Skirving, and was at all times considered as personal property in which the Defendant Skirving never at any time claimed an interest, and was not sold to the Defendants Rees and no consideration was paid by the Defendants Rees therefor.*

"That the Defendants Rees and wife, have become unjustly and unlawfully enriched by their conversion of Plaintiffs' buildings in the amount of $1,000.00, and Plaintiffs are entitled to judgment therefor. (Italics ours)

(c) The exhibits offered in evidence by appellants

Defendants offered as an exhibit in the Superior Court a certain letter written by their then attorney, M. L. Longfellow, in which they asserted ownership of the house, and demanded that plaintiffs immediately vacate the same (R. 64-65).

When the right to a discharge of the judgment debt was under consideration in the Bankruptcy Court, appellants themselves offered in evidence all of the above pleadings, findings and conclusions and the

Longfellow letter. They offered no oral testimony, but relied entirely upon the record (R. 8). They cannot now complain of error because the Referee also relied upon that record, or that the District Court erred in likewise relying upon it.

The facts, as found by the Superior Court, speak for themselves. The appellants knew when they bought the land from Cora J. Skirving that she did not own the buildings. They knew they were considered as personalty and were not a part of the land. They paid no consideration for the buildings. They were told by Mrs. Skirving that she did not own them, and they freely admitted in their pleadings that they knew at the time of the sale the circumstances surrounding the severance of the buildings from the land.

The adjoining Tax Lot 4 they bought from King County for $50.00. It would be absurd to believe that they thought they were buying any improvements for such a small amount. At no point in either their pleadings, their testimony or their evidence have they urged upon either of the three tribunals hearing the issues that any consideration was paid to King County for the buildings.

Yet they took possession of the buildings and ejected the appellees therefrom. Their acts were deliberate. The facts clearly establish a design upon their part to obtain possession of the buildings. They intended to take property which did not belong to them, and when they excluded appellees from the property they actually accomplished the conversion. That such a conversion is unlawful is irrefutable. The Referee could ar-

rive at no other conclusion (R. 13, 15, 17, 18, 19). Nor could the district judge (R. 24, 27).

Discussing the facts in his written decision, the Referee said:

> "Of great and controlling importance in this case are the facts that the buildings belonging to the Jensens and converted by the Rees' were personal property, had been severed from the realty in a lien foreclosure against 'Doc' Hamilton, and had been physically removed from the place they were originally constructed. * * * (R. 8)
>
> "These circumstances and the fact that the bankrupts did not avail themselves of the privilege of taking the witness stand and explaining what motives they had or what possible justification they could have in converting to their own use the personal property of the judgment creditors, leaves the Findings of Fact and Conclusions of Law upon which the judgment is based unanswerable. * * *" (R. 8)
>
> "In this case the Reeses did not come into possession of this personal property by the consent of the owner, nor by inadvertence. The Findings of Fact and Conclusions of Law above quoted negative any contention that when they bought the property they thought the buildings were attached thereto as realty and that they were, therefore, the owners thereof. They did not so testify and the evidence established that they designedly obtained possession of these buildings and converted them to their own use and, therefore, the judgment based upon said conversion is not dischargeable in bankruptcy." (R. 13)

2. Does An Intentional Unlawful Conversion Come Within the Meaning of "Wilful and Malicious Injuries to the Person and Property of Another"?

The District Court aptly said:

> "If the matter were before me as a matter of first impression and without restriction by judicial decisions of courts which bind me, I would have no great difficulty. * * * But I am bound and controlled by a forest of authority. The weight of authority is to the effect that those simple words ('wilful and malicious injuries to the person or property of another') include intentional conversion of the kind which Judge Ronald (of the Superior Court) in his findings determined occurred on the part of the bankrupts as against the property of Mr. and Mrs. Jensen." * * * (R. 24-25)

(a) Intentional conversion is a wilful and malicious injury to the property of another.

To constitute a wilful and malicious injury to property, the conversion must have been with the intent to convert the same, knowing that the property was the property of another. It was not necessary to use the words "wilful and malicious" in the pleadings or in the judgment of the court if the facts upon the record and as found by the court constituted an intentional and deliberate appropriation of the property by the bankrupt for his own uses. No personal malice need be shown, but the wrongdoer will be held responsible for the legal effects of his acts.

This view has been held in many cases, a leading case being

Tinker v. Colwell, 193 U.S. 473.

Since this case has been time after time quoted from in the decisions involving construction of the words "wilful and malicious" injuries in bankruptcy cases, we quote at length as follows:

> "In order to come within the meaning of a judgment for a wilful and malicious injury to person or property, it is not necessary that the cause of action be based upon a special malice so that without it the action could not be maintained. * * * A wilful disregard of whatever he knows to be his duty, an act which is against good morals and wrongful in and of itself, and which necessarily causes injury, and is done intentionally, may be said to be done wilfully and maliciously, so as to come within the exception. * * *
>
> "It is urged that the malice referred to in the exception is malice toward the individual personally, such as is meant, for instance, in a statute for maliciously injuring or destroying property, or for malicious mischief, where mere, intentional injury without malice toward the individual has been held by some courts not to be sufficient. *Commonwealth v. Williams*, 110 Mass. 401.
>
> "We are not inclined to place such a narrow construction upon the language of the exception. We do not think the language used was intended to limit the exception in any such way. * * * It was an honest debtor and not a malicious wrongdoer that was to be discharged.
>
> "There may be cases where the act has been performed without any particular malice toward the husband, but we are of opinion that, within the meaning of the exception, it is not necessary

that there should be this particular, and, so to speak, personal malevolence toward the husband, but that the act itself necessarily implies that degree of malice which is sufficient to bring the case within the exception stated in the statute. The act is wilful, of course, in the sense that it is intentional and voluntary, and we think that it is also malicious within the meaning of the statute.

"In *Bromage v. Prosser*, 4 Barn & Cres 247, which was an action of slander, Mr. Justice Bayley, among other things, said:

" 'Malice, in common acceptation, means ill will against a person, but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it of malice, because I do it intentionally and without just cause or excuse. If I maim cattle, without knowing whose they are, if I poison a fishery, without knowing the owner, I do it of malice, because it is a wrongful act, and done intentionally. If I am arraigned of felony and wilfully stand mute, I am said to do it of malice, because it is intentional and without just cause or excuse. And if I traduce a man, whether I know him or not and whether I intend to do him an injury or not, I apprehend the law considers it as done of malice, because it is wrongful and intentional. It equally works an injury, whether I produce an injury or not.'

"We cite the case as a good definition of the legal meaning of the word malice. The law will, as we think, imply that degree of malice in an act of the nature under consideration, which is sufficient to bring it within the exception mentioned."

In discussing another case of damages for seduction of a daughter, that court, quoting from *In re Freche*, 109 Fed. 620, said:

> "'From the nature of the case the act * * * which caused the injury was wilful, because it was voluntary. The act was unlawful, wrongful and tortuous, and, being wilfully done, it was, in law, malicious. It was malicious because the injurious consequences which followed the wrongful act were those which might naturally be expected to result from it, and which the defendant must be presumed to have had in mind when he committed the offense. "Malice" in law simply means a depraved inclination on the part of a person to disregard the rights of others, which intent is manifested by his injurious acts. While it may be true that in his unlawful act Freche was not actuated by hatred or revenge or passion towards the plaintiff, nevertheless, if he acted wantonly against what any man of reasonable intelligence must have known to be contrary to his duty, and purposely prejudicial and injurious to another, the law will imply malice * * *'
>
> "The judgment here mentioned comes, as we think, within the language of the statute reasonably construed * * *"

The courts have universally held that an intentional conversion of the property of another amounts in law to wilfulness and malice. The leading and most quoted case on this subject is *McIntyre v. Kavanaugh*, 242 U.S. 138:

> "In this case McIntyre & Co. were brokers. They received certain stock certificates owned by Kavanaugh to hold them as security for his indebtedness to them. Within a few weeks with-

out authority and his knowledge, they sold the stocks and appropriated the avails to their own use. The firm became bankrupt.

"Plaintiff, nevertheless, sued for damages for wrongful conversion, and it was argued that 'an examination of our several Bankruptcy Acts and consideration of purpose and history of the 1903 Amendment will show Congress never intended the words in question to include conversion.'

"We can find no sufficient reason for such a narrow construction. * * *

"It is not necessary that physical injury to property be inflicted to constitute wilful and malicious injury. Special malice against the owner of property need not exist.

"But depriving a person of his property, without authority is sufficient to show a wilful disregard of his duty and is sufficient to constitute wilful and malicious injury.

"The circumstances disclosed suffice to show a wilful and malicious injury to property for which plaintiff in error became and remains liable to respond in damages."

The case of *Bever v. Swecker*, 138 Ia. 728, 116 N.W. 704 (1908), is of special interest because it involved another kind of conversion more nearly like the conversion at bar. Cattle of plaintiff were converted by the bankrupt.

In this case the judgment creditor brought a garnishment proceeding to subject property to payment of his judgment. A motion was made to discharge the garnishment on the ground that the debt was dis-

charged by the bankruptcy. The motion was overruled and judgment was granted against the garnishee. Upon appeal the lower court was affirmed.

The question before the Supreme Court was a determination of the meaning of the words "wilful and malicious injuries to property." The court said:

> "Was the judgment in this case for the unlawful and malicious injury to the property of plaintiff? This is the pivotal question in the case. That the act of Defendant in taking the cattle was unlawful there can be no question; but was it 'malicious' as the term is used in the Bankruptcy Act? The only showing in addition to that heretofore stated regarding the matter of Defenddant's liability is that Plaintiff commenced suit to recover the value of the cattle which resulted in the judgment upon which the execution issued. * * *
>
> "The only remaining inquiry is: 'Was the injury to the property "malicious" as that term is used in the Bankruptcy Act?' "

Adopting the language of *Christal v. Clisbe* (Mass.) 76 N.E. 11, the court said:

> "It is scarcely necessary to say that the taking and carrying away of the property of another is an injury to that property * * * We are satisfied that the judgment in the case was for wilful and malicious injury to the property of Plaintiff * * * The claim need not be reduced to judgment. If it be merged in a judgment we go to the nature of the liability to determine the question of release.
>
> "There is no doubt, we think, that the liability in the case was for wilful and malicious injury to property, as those terms are used in Bank-

ruptcy Act. The injury or wrong was just as malicious as an assault and battery upon the person would have been, and in such case it is universally held that the bankrupt is not released * * * Moreover, the liability was in tort and the tort could not be waived and the debt was not provable in the Bankruptcy proceedings."

The court said in *Greenfield v. Tucillo* (C.C.A. 2, 1942) 49 A.B.R. (N.S.) 529:

"The question is whether the liability to Greenfield was for 'wilful and malicious' injury. Such injuries have been defined by the Supreme Court as arising from an act involving a wilful disregard for what one knows to be his duty, an act which is against good morals and wrongful in and of itself, and which necessarily causes injury and is done intentionally."

In Remington on Bankruptcy, Vol. 7, 813, it is said:

"* * * actual malice is made out within the meaning of Sec. 17(a) * * * (2) where the act is shown to have been an intentional and wrongful act and without just cause or excuse. An actual physical injury to the subject matter of the property is not essential."

To like effect are the following well known cases involving many types of conversion:

Matter of Binsky, 24 A.B.R. 496 (conversion of collateral);

Matter of Gumbinsky, 8 F. Supp. 601 (conversion of money);

In re Keeler, 40 A.B.R. 231, 243 Fed. 770;

Covington v. Rosenbusch, 42 A.B.R. 400 (conversion of wages);

In re Stenger, 49 A.B.R. 224 (conversion of insurance premiums);

Baker v. Bryant Fertilizer Co., 46 A.B.R. 579;

In re Nordlight, 22 A.B.R. 481;

Campbell v. Gates, 239 N.Y. 457;

Matter of Goldstein, 30 F. Supp. 443 (conversion of real property);

Van Epps v. Aufdemkamp, 32 P.(2d) 1116 (conversion of stock certificates);

Smith v. Ladrie, 129 Atl. 302 (conversion of flour);

In re Stark, 18 A.B.R. (N.S.) 278;

In re Franks, 17 A.B.R. (N.S.) 304;

In re Brier, 2 A.B.R. (N.S.) 756, 766;

Probst v. Jones, 247 N.W. 779 (conversion of a deed);

Woelfle v. Giles, 184 S.W.(2d) 177 (conversion of mortgaged property);

Frangos v. Frangos, 41 Atl.(2d) 416 (conversion of money);

Globe Indemnity Co. v. Granskar, 16 N.W. (2d) 437;

Matter of Buzas, 58 F. Supp. 717 (damage to land);

In re Blauweiss, 23 N.Y.S.(2d) 907 (conversion of emerald);

Weeks v. Streicher, 58 N.E.(2d) 415 (conversion of real property);

Knights Products Inc. v. Donnen Fuel Co., 20 N.Y.S.(2d) 135 (conversion of trust money);

Matter of Minsky, 46 F. Supp. 104 (inducing breach of contract);

Norby v. Cain, 176 S.E.(2d) 813.

In *Smith v. Ladrie, supra*, the court relied upon the following quotation from *Tnker v. Colwell, supra*:

> " 'But when the conversion is the result of a deliberate and intentional disregard of another's legal rights, it is a wilful and malicious injury to his property. It is wilful because it is voluntary (Webster's New International Dictionary), and it is malicious, because it is intentional'."

In *Matter of Goldstein, supra*, the court said:

> "I am forced to the conclusion that 'unlawful and wilful are practically synonymous with 'wilful and malicious,' and that therefore the arrest on the civil process of petitioner was upon a debt not dischargable in bankruptcy * * *."

(b) Actual words of the statute need not be pleaded

Actual malice need not be pleaded or proved. The acts complained of need not be charged in the language of the statute. But the state court's ruling on the nature of the liability as established by the judgment will be adopted.

In re Greene, 87 F.(2d) 951.

4 Words and Phrases, 2nd Series 1312, which succinctly states:

> "The term 'wilful and malicious' as used in the bankruptcy act in question need not involve actual malice, as we usually think of that term. In fact, actual malice is seldom present in such cases. If an act, wrongful within itself, is done intentionally and in wilful disregard of what one knows

to be his duty, and which through necessity, causes an injury to another, it may be said, under the act, to be done wilfully and maliciously. Wilful and malicious injury, in the bankruptcy act, does not necessarily involve hatred or ill will as a state of mind, but arises from a wrongful act, done intentionally without just cause or excuse."

It is not necessary to plead the words "wilful or malicious." The court, *In re Northrup*, 265 Fed. 420 said:

"While the complaint does not expressly state that the conversion was wilfully done, still it must have been, if the defendant did what the complaint says; and hence the conversion was a wilful injury to the property of Taylor, and the claim, if sustained, on a trial of the action, would not be one discharged in bankruptcy.

"Not every conversion of property constitutes a wilful and malicious injury to property; but if a person knowingly and wilfully takes the property of another without the owner's consent, express or implied, and appropriates it to his own use, it is difficult to understand why the act so done does not constitute a wilful and malicious injury to the property of the person whose property is so taken and used."

Heaphy v. Kerr, 180 N.Y.S. 542;

Wood v. Fisk, 109 N.E. 177;

Kavanaugh v. McIntyre, supra;

Andrews v. Dresser (N.Y.) 108 N.E. 1088;

In re Werner, 88 F.(2d) 899, 33 A.B.R. (N.S.) 656.

With the foregoing wealth of authority to guide us, the conclusion is inescapable that appellants not only

physically converted the houses and structures of appellees, but that their conversion was wilful and malicious within the meaning of the bankruptcy act.

COMMENTS ON BRIEF OF APPELLANTS

1. Conversion of the Property of Appellees

On pages 4 to 8 of appellants' brief, they urge now for the first time that the question of conversion was never before the lower court, claiming that the pleadings did not raise the issue. However, the complaint clearly pleaded wrongful conversion of the buildings in paragraphs III, IV and V of the second cause of action, as well as the prayer for relief (R. 45, 46, 47). Moreover, except in their formal pleadings no denial was ever made either before the Superior Court or the referee, that they had converted the buildings. In fact, they admitted conversion, and in an effort to justify it, they even offered in evidence a letter from their then attorney, M. L. Longfellow. But the letter proved too much, for it demanded possession of the buildings from appellees, albeit on some unsure and elusive theory that they owned the same.

They further attempted to meet the issue of conversion in the lower court by offering their contract of purchase from Cora J. Skirving, which contained formal printed provisions, providing for the sale of appurtenances and keeping the buildings thereon insured. But the court found that the buildings were not included in the sale and no consideration was paid for them in the purchase price.

As if unconvinced of their own position, appellants

fall back upon the case of *Davis v. Aetna Acceptance Co.*, 293 U.S. 328, seeking to bring the acts of their conversion within the well known category of those cases where the conversion involved no intent to take property knowing it to belong to another. We have no quarrel with that case, nor those which follow it, for the conversion there was innocent and technical, and contained none of the elements of wilfulness or malice interfused in the case at bar. Here was no "innocent misadventure of the bankrupts" (Appellants' Brief 18), but a craftily calculated design to obtain possession of appellees' buildings, knowing they had not purchased them and that they belonged to appellees.

We have already discussed in detail the cases upon which we rely, some of which appellants have cited on pages 20 and 21 of their brief. Appellants' attempt to distinguish them from the case at bar is unconvincing. They particularly mention *Tinker v. Colwell*, *supra*, and *In re Freche*, *supra*, on the ground that those leading cases which established the basic rule of law in conversion cases involved "quasi-criminal acts of bankruptcy as criminal conversation and seduction which import a wanton disregard for the rights of others in their very nature." It is significant, however, that the courts of all jurisdictions of the country have made no such distinction, but have universally followed the law laid down therein in cases involving every kind of tangible and intangible property, on the well grounded theory that the crux of the issue is the nature of the conversion rather than the nature of the property converted.

2. The Burden of Proof

On page 32 of appellants' brief, the court is told that the burden of proof is upon the judgment creditor to show that the liability comes within the exception of Section 17(a)(2), and that the referee shifted it to appellants.

Appellants ably assisted appellees in meeting the burden, for it was they who offered in evidence before the referee the pleadings, the findings of fact and conclusions of law and the exhibits of the Superior Court action (R. 65, 79). They cannot complain now that the Bankruptcy Court admitted them, and that appellees used them to prove their case at the hearing on their objections to the discharge of their judgment debt. At no stage of the proceedings did the burden shift. It became fixed by the adoption of the Superior Court record as the record in the Bankruptcy Court. All litigating parties relied upon that record, and the facts it contained.

Wilfulness and malice inhere in the legal conclusions which the courts attach to the acts already proved and now of record in the Bankruptcy Court. The burden has now expended itself; and the only question before the referee, the District Court and this court is the applicability of the rule to the facts proven and recorded.

Appellants entirely misinterpreted the language of the referee to the effect that the appellants did not avail themselves of the privilege of taking the witness stand and explaining their motives in converting appellees' property. The referee merely meant that since

no oral testimony was offered by appellants to rebut the findings and conclusions of the lower court, he had no other alternative than to decide the question upon the record and the circumstances of the conversion as shown therein. The question of burden of proof was not involved in his statement at all (R. 6. 8).

The cases cited on page 33 of appellants' brief are not in point for the reason that those cases were not tried on a record previously made in another court. The question involved there arose in the original trial.

3. Appellants Claim They Were Confused Regarding Their Rights

In defending against the referee's and the District Court's decision holding that the legal effect of appellants' acts of conversion were wilful and malicious, on page 23 of appellants' brief, they say that their conduct was consistent with a state of innocent confusion as to their right to appellees' buildings. They showed no evidence of confusion, however, for they proceeded cautiously, engaged a lawyer, and demanded possession of the buildings without having sought a legal tribunal to have their rights determined. If there was confusion in their minds as to the rightful owner, then they did, by admitted fact, act in wanton disregard for appellees' rights, and the wilful and malicious character of the conversion became complete.

The inconsistency of appellants' vascillating positions with reference to their right to the buildings, as stated in pages 24 and 25 of their brief, leaves their arguments unworthy of attention. At one point they state they had doubt about the location of the build-

ings, but two paragraphs later they state they were justified in believing that they bought the buildings as a part of the Skirving property. Suffice it to say, the Superior Court found that they *knew* the buildings were not included in that sale (R. 74, 75).

4. The Stricken Paragraph in the Lower Court's Findings

In appellants' struggle to justify their conversion, they propose on page 25 of their brief a further and yet more inconsistent and irrational argument to the effect that appellants "asserted a well-founded claim to the structures" because there was a discrepancy in the boundary line between Tax Lot 4 and the Skirving land. Actually, however, the location of the exact boundary line between the two properties had nothing to do with appellants' acquisition of the buildings, for the simple reason that they knew they were not included in the sale.They paid only $50.00 for Tax Lot 4, consisting of one and a half acres. They paid only $1900.00 for the Skirving land, consisting of 22 acres. It is ridiculous to argue or assume that any structures were included in either purchase.

Yet, appellants on pages 12 and 27 of their brief have laid great stress upon the fact that the lower court struck out a sentence in the findings to the effect that at the time of the purchase of Tax Lot 4 the appellants knew it was worth more than they paid for it, and also knew that appellees were ignorant of the proceedings pending in the county treasurer's office for the purchase (R. 72)

After all, these findings were immaterial to find-

ing of intentional conversion of the buildings. The actual foundation for the conversion was laid during the negotiations for the purchase of the *Skirving* property, not at the time of the negotiations for the purchase of *Tax Lot 4*.

On page 27 of appellants' brief they complain that the referee commented in his decision that it was logical to believe that when appellants negotiated for the purchase of Tax Lot 4 they believed they were buying vacant land, and not land and buildings, because of the great variance between the $50 bid and payment for the tax lot and the $1000 value on the buildings alone (R. 8). However, this comment was a natural deduction from the facts; and the comment resulted in giving appellants the benefit of honesty and fair dealing with the treasurer, to which they were not exactly entitled, in view of the Longfellow letter (R. 64) written on the heels of the purchase asserting that they were entitled to the buildings, either because they were located on Tax Lot 4 or on the Skirving property.

By no stretch of the imagination can appellants claim, as they do, on pages 27 and 28 of their brief that the referee rested his decision on the stricken words of the lower court, for he had the whole record before him, replete with statements in the pleadings of all the litigating parties and the findings and conclusions, justifying his decision that appellants had intentionally converted buildings knowing they belonged to another.

On page 29 of appellants' brief they charge that the

referee failed to grasp the facts of the controversy because he stated in his decision (R. 15):

> "* * * (the structures) * * * were considered and known to all the parties, including the bankrupts, to be the personal property of the judgment creditors * * *."

What other conclusion could any intelligent person reach?

They acquired the Skirving property on January *13*, 1944 (R. 63).

They demanded possesion of the buildings from appellants the next day, January *14*, 1944 (R. 71).

They did not acquire Tax Lot 4 until January *20*, 1944 (R. 71), six days after the demand has been made.

Their alacrity in converting the property clearly implies that they knew appellees owned it.

If they had not known the property belonged to the appellees, why did they demand possession from *them?*

Besides, the pleadings and findings show that appellants were negotiating for both parcels of property at the same time, and they were intimately acquainted with appellees' ownership of the buildings during all the negotiations. The lower court made a finding, without objection from them, that appellees had collected rentals on the buildings for the two months following appellants' purchase of both parcels of land (R. 76).

5. The Referee's Inadvertence in Describing Property

On pages 30 and 31 of appellants' brief, appellants lay great stress upon a purely typographical error in a portion of the referee's decision, in which he stated that the buildings had been physically removed from the place they were originally constructed "and probably mistakenly placed upon Tax Lot 4" (R. 8).

The referee had a clear concept of all the facts. His keen analysis and understanding of the issues is indicated throughout his entire written opinion. It is apparent that he meant to say "and probably mistakenly placed upon another portion of the Skirving property." A reasonable, fair-minded perusal of the decision would lead to no other conclusion. It is not worthy of the dignity of the court to pounce upon a patently inadvertent error and attempt to make it a major argument in the case.

It is significant that appellants took no notice of the inadvertence when the findings of fact and conclusions of law were presented to the referee, nor did they call it to the attention of the District Court upon the review.

6. The District Court's Decision

By substracting a sentence here and there from the district court's decision, appellants in their brief on page 35 perceive a disposition in the court to disagree with the referee. This they claim is grounds for reversal.

When the decision is taken as a whole, the total is

in complete accord with the referee. The court said (R. 24):

> "I have given serious consideration to the records of the entire bankruptcy matter and to the records as admitted in evidence in the Superior Court action upon which the judgment of Mr. and Mrs. Jensen was based. I have also given serious consideration to the respective briefs of the parties and been aided by the oral argument which was presented to me in August. * * *
>
> "With no decisions to guide my course, I am inclined to believe that I would consider the language as not protecting the judgment of Mr. and Mrs. Jensen. But I am bound and controlled by a forest of authority. The weight of authority is to the effect that those simple words ('wilful and malicious injuries to the person or property of another' appearing in the bankruptcy statute) include intentional conversion of the kind which Judge Ronald (the Superior Court judge) in his findings determined occurred on the part of the bankrupts as against the property of Mr. and Mrs. Jensen. As a result, I feel that in the light of the authorities which control me I must sustain, and therefore I do sustain the decision of the referee. (R. 25)
>
> "The opinion of the referee as found in the files displays that sufficient study of authorities and consideration of the findings of the Superior Court judge as make unnecessary any substantial discourse by me. (R. 25) * * *
>
> "I feel I have no right to go further. I would not be justified in overruling the referee by virtue of the feeling that I have that were there no decisions controlling me that my opinion might

be different. I can and will say that I am not absolutely certain that the referee was correct. *However, the records here, the arguments and the authorities sufficiently indicate that he is correct and that I would have no right to reverse his conclusions.* I am not indicating that my mind is evenly balanced as to whether or not the referee is correct. Even in that event I take it that I should allow his ruling to stand. I will go further and say that I think it considerably more probable that he is right than that he is mistaken. So, of course, his decision is sustained." (R. 27) (Italics ours)

The very language of the court is a complete answer to the cases quoted on page 37 of appellants' brief. It was the prerogative of the District Court to give whatever weight he deemed justified to the referee's decision upon review. The fact that he resolved the points of law and the facts so as to reach the same result does not indicate he accorded excessive weight to the referee's findings; and his own statements above quoted from his oral decision refutes the implication that he felt bound to merely follow the referee's decision.

CONCLUSION

Upon the facts as pleaded and proved and upon the record voluntarily submitted in evidence to the Bankruptcy Court by the appellants themselves, the bankrupts intentionally and unlawfully converted the property of the judgment creditors.

From the principles laid down above and the great volume and variety of cases decided in many jurisdic-

tions, the only conclusion which can be reached is that the judgment debt here falls within the exceptions of Sec. 17(a)(2) of the bankruptcy act, and is not discharged by the bankruptcy of appellants.

The District Court's order sustaining the referee's decision to this effect should be affirmed.

Respectfully submitted,

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May 5, 1948.